

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROBERT L. RICHARDSON
Claimant

VS.

OLSON MANUFACTURING & DISTRIBUTION, INC.
Respondent

AND

HAWKEYE SECURITY INSURANCE COMPANY
Insurance Carrier

Docket No. 158,474

ORDER

ON the 1st day of March, 1994, the application of the claimant for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Alvin E. Witwer dated January 20, 1994, came on for oral argument in person in Kansas City, Kansas.

APPEARANCES

Claimant appeared by his attorney, Gary R. Terrill, of Overland Park, Kansas. Respondent and insurance carrier by their attorney, Joseph R. Ebbert, of Kansas City, Kansas. There were no other appearances.

RECORD

The record as specifically set forth in the Award of the Administrative Law Judge dated January 20, 1994, is hereby adopted by the Appeals Board.

STIPULATIONS

The stipulations are herein adopted by the Appeals Board as specifically set forth in the Award of the Administrative Law Judge dated January 20, 1994.

ISSUES

The issues presented by oral argument for decision by the Appeals Board are:

- (1) Whether claimant's low back injury arose out of and in the course of his employment with the respondent.
- (2) What is the nature and extent of claimant's disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record and the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

- (1) The claimant, Robert L. Richardson, while performing his job duties for the respondent, Olson Manufacturing and Distribution, Inc., injured his left elbow and low back. As a result of his low back injury, claimant is entitled to a twenty percent (20%) permanent partial general disability on the basis of functional impairment.

The parties have stipulated that the claimant, on March 15, 1989, met with personal injury by accident which arose out of and in the course of his employment with the respondent. The claimant alleges that he received injuries to both his left elbow and his low back as a direct result of this accident. Respondent contends that the claimant only injured his left elbow and no permanent functional impairment resulted from the left elbow injury.

On the date of his accidental injury, March 15, 1989, the claimant had been employed by the respondent as a sales person since 1983. On this particular day the claimant was at the respondent's manufacturing plant taking inventory, a job duty that he occasionally performed for the respondent. He fell about five feet from the top of a stack of cartons to the concrete floor, hitting his left arm on a steel beam as he fell, landing on his back and neck. The only visible injury that the claimant had at that time was a cut to his left elbow. The claimant's left elbow injury eventually became infected because of the trauma and the cut.

The claimant testified that he notified Bud Towns, the respondent's plant superintendent, regarding the accident and injury to his left elbow the same week that the accident occurred. Because the respondent did not direct the claimant to a doctor for treatment, he sought medical treatment for his left elbow with Sol H. Dubin, M.D., a board certified orthopedic surgeon, who first treated the claimant on May 8, 1989. Dr. Dubin saw the claimant on four separate occasions in May of 1989 and finally discharged the claimant to return as needed on May 22, 1989. Dr. Dubin's office notes do not reflect that the claimant made any complaints in reference to his back. Dr. Dubin testified that he did not recall the claimant making any such back complaints. Dr. Dubin's medical records only reflect treatment of the elbow. However, contained in the patient's registration, which was filled out and dated by the claimant during his first visit to Dr. Dubin's office, there is a notation which states, "LBP in legs," which stands for low back pain in legs. The claimant testified that his left elbow injury was at first the most visible problem, but he was also having increasing problems with back and leg pain. Even though Dr. Dubin's medical records do not note the claimant's back complaints, the claimant testified that he did mention his ongoing back problems to the doctor.

Finally, as a result of his increasing symptoms concerning his back, the claimant sought medical treatment with John W. Collins, M.D., an orthopedic surgeon, on July 26, 1989. In the medical history that the claimant related to Dr. Collins, the claimant noted a previous herniated disc at the L4-L5 level which occurred in 1983. At that time, he

underwent a Chymopapain injection which was successful. After an MRI, Dr. Collins diagnosed a herniated disc at L4-L5 which he directly related to the claimant's accident injury of March 15, 1989. In an effort to relieve the claimant of his discomfort, on February 22, 1990, Dr. Collins performed a percutaneous lumbar discectomy at the L4-L5 level. Claimant missed only a few days of work because of the surgery before returning to his regular job as a salesman for the respondent. He was able to successfully perform his job duties as a salesman until July of 1990, when he turned 65-years old and decided to retire.

Subsequent to his retirement, the claimant continued to have back and leg pain. He returned for treatment to Dr. Collins, who followed the claimant until the respondent's insurance carrier changed the claimant's treating physician to Theodore L. Sandow, Jr., M.D., an orthopedic surgeon in Kansas City, Missouri. Dr. Sandow's initial visit with the claimant was on April 22, 1992. The claimant, at that time, had continuing complaints of back pain. Dr. Sandow found tenderness over the entire lumbar spine area and sacroiliac joints, positive straight leg raises, and degenerative joint and disc disease. Three epidural steroid injections were prescribed and undergone with no improvement. A myelogram showed spinal stenosis at L2-L3, L3-L4, and L4-L5. Traction and physical therapy were also prescribed without much improvement. Dr. Sandow finally released the claimant to return as needed on October 12, 1992, prescribing Relafen, a nonacidic-type anti-inflammatory drug. As to the claimant's permanent physical impairment, taking into consideration the claimant's previous surgery and persistent residual symptoms, Dr. Sandow opined that the claimant's physical impairment of the body as a whole was ten percent (10%).

In regard to the spinal stenosis and degenerative disc disease found in the claimant's low back, it is Dr. Sandow's opinion that these conditions could have been aggravated and activated by a fall such as that described by the claimant in his initial history. If the presence of spinal stenosis and degenerative disc disease are taken into consideration in formulating an opinion as to claimant's functional impairment, Dr. Sandow's opinion would be somewhere between fifteen to twenty percent (15-20%).

At the request of claimant's attorney, Edward J. Prostic, M.D., a board certified orthopedic surgeon, examined and evaluated the claimant on January 28, 1993. Dr. Prostic personally took a medical history from the claimant, performed a physical and x-ray examination and reviewed medical records of claimant's previous treatment. His diagnosis was that the claimant had sustained an injury to his low back at the L4-L5 disc level. Dr. Prostic further established that the claimant's disc herniation resulted from the fall he suffered in March of 1989 while he was employed with the respondent.

Positive findings were present along with radicular symptoms of the right leg indicating a nerve injury. With respect to permanent functional impairment, it is Dr. Prostic's opinion that claimant's work related accident has resulted in a permanent partial impairment of twenty-two and one-half percent (22.5%) to the body as a whole on a functional basis. Abnormal x-rays, limited range of motion and the claimant's history of disc surgery formed part of the basis of Dr. Prostic's opinion. Additionally, this opinion is based on his personal knowledge, training, experience, American Medical Association's Guides to the Evaluation of Permanent Impairment, and Manual for Orthopedic Surgeons Evaluating Permanent Physical Impairment.

Permanent work restrictions were placed on the claimant by Dr. Prostic as follows:

- (1) Lifting limited to 35 pounds on a single-lift basis;
- (2) Lifting limited to 15 pounds on a repetitive basis;
- (3) Avoid frequent bending or twisting at the waist;
- (4) Avoid forceful pushing and pulling; and
- (5) Avoid use of vibrating equipment.

In a workers compensation case, the claimant has the burden of proof to establish his right to an award of compensation by a preponderance of the credible evidence. K.S.A. 44-501(a) and K.S.A. 44-508(g).

In the case at hand, the claimant has presented persuasive evidence that he suffered a low back injury when he fell taking inventory on March 15, 1989. Uncontradicted evidence presented by the claimant through his testimony established that he notified the respondent in regard to his accident and resulting elbow and low back injuries within the week of the accident. The treating and examining doctors' testimony and medical records established that the claimant's low back injury was a result of his fall on March 15, 1989. Accordingly, it is the finding of the Appeals Board that the claimant's low back injury arose out of and in the course of his employment with the respondent.

Consequently, the only remaining question to be decided, in the instant case, is the nature and extent of claimant's disability. Since claimant only missed a few days of work as a result of his back surgery and left his employment in July of 1990 due to voluntary retirement, he is limited to his percentage of functional disability. See K.S.A. 1988 Supp. 44-510e(a). The claimant does not make a claim for any permanent disability in regard to his elbow injury. The Administrative Law Judge found in reference to the claimant's low back injury that he possessed a fifteen percent (15%) impairment of function of the body as a whole. The respondent argues that if the claimant's low back injury is determined to be compensable, that Dr. Sandow's rating of ten percent (10%) is reasonable. The claimant makes claim for a twenty percent (20%) permanent partial disability based on Dr. Sandow's fifteen to twenty percent (15-20%) rating, which takes into consideration the claimant's spinal stenosis and degenerative spinal condition, and equally weighing this opinion with Dr. Prostic's twenty-two and one-half percent (22.5%) rating.

After considering the whole record, the Appeals Board finds that Dr. Sandow's and Dr. Prostic's opinions in regard to claimant's functional impairment are both persuasive and should be given equal weight. Therefore, by taking the average of Dr. Sandow's fifteen to twenty percent (15-20%) rating which is seventeen and one-half percent (17.5%), and equally weighing this rating with Dr. Prostic's twenty-two and one-half percent (22.5%) rating, the Appeals Board finds that the claimant is entitled to a twenty percent (20%) permanent partial general functional disability award.

- (2) The Appeals Board incorporates herein by reference the findings of the Administrative Law Judge in his Award dated January 20, 1994, as these findings relate to the issues of future medical, unauthorized medical, and payment of specific, reasonable, and necessary medical expenses incurred by the claimant.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Award of Administrative Law Judge Alvin E. Witwer dated January 20, 1994, is hereby modified and an award is entered as follows:

AN AWARD OF COMPENSATION IS HEREBY ENTERED IN ACCORDANCE WITH THE ABOVE FINDINGS in favor of the claimant, Robert L. Richardson, and against the respondent, Olson Manufacturing & Distribution, Inc., and its insurance carrier, Hawkeye Security Insurance Company, for an accidental injury sustained on March 15, 1989, and based on an average weekly wage of \$542.49.

The claimant is entitled to 415 weeks of permanent partial general functional disability at the rate of \$72.34 per week or \$30,021.10 for a twenty percent (20%) permanent partial general body functional disability, making a total award of \$30,021.10.

As of June 29, 1994, there would be due and owing to the claimant 276.14 weeks of permanent partial general disability compensation at \$72.34 per week for a total of \$19,975.97 which is due in one lump sum less any amounts previously paid. Thereafter, the remaining balance in the amount of \$10,045.13 shall be paid at \$72.34 per week for 138.86 weeks or until further order of the Director.

The claimant is entitled to future medical treatment, unauthorized medical and payment of specific, reasonable, and necessary medical expenses incurred by the claimant as set forth in the Award of the Administrative Law Judge dated January 20, 1994, in his Findings numbered 1 through 4.

The claimant's attorney fees are approved subject to the provisions of K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the Kansas Workers Compensation Act are hereby assessed against the respondent to be paid direct as follows:

HOSTETLER & ASSOCIATES, INC.	\$ 668.35
RICHARD KUPPER & ASSOCIATES	\$ 92.85
GENE DOLGINOFF ASSOCIATES, LTD.	\$ 502.00

IT IS SO ORDERED.

Dated this _____ day of June, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Gary R. Terrill, PO Box 12290, Overland Park, Kansas 66282
Joseph R. Ebbert, 100 Sec Bk Bldg, 707 Minnesota, Kansas City, Kansas 66101
Alvin E. Witwer, Administrative Law Judge
George Gomez, Director